



22852

PATENT TRADEMARK OFFICE

PATENT

Customer No. 22,852

Attorney Docket No. 5725.0489-00

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of:

Gerard LANG et al.

Application No.: 09/424,116

Filed: January 6, 2000

For: OXIDATION DYEING COMPOSITION
FOR KERATINOUS FIBRES
CONTAINING A 3-AMINOPYRIDINE AZO
DERIVATIVE AND DYEING METHOD
USING SAID COMPOSITION

Group Art Unit: 1751

Examiner: M. Einsmann

Commissioner for Patents and Trademarks
Washington, DC 20231

Sir:

RECEIVED

DEC 03 2002

TC 1700

RESPONSE

The Office Action dated July 31, 2002, has been received and its contents carefully considered. The July 31, 2002, Office Action did not set a shortened statutory period for reply (Office Action of July 31, 2002, pg. 1); accordingly a timely response may be filed up to January 31, 2003, which is six months from the mailing date of the Office Action. In light of the following remarks, Applicants respectfully request

reconsideration and withdrawal of the pending rejections:

I. Rejections under 35 U.S.C. § 103

A. U.S. Patent No. 4,025,301 (Lang) in View of U.S. Patent No. 4,588,410 (Konrad).

Claims 26-36 and 40-60 stand rejection under 35 U.S.C. §103(a) as unpatentable over U.S. Patent No. 4,025,301 to Lang (Lang) in view of U.S. Patent No.

FINNEGAN
HENDERSON
FARABOW
GARRETT &
DUNNER LLP

1300 I Street, NW
Washington, DC 20005
202.408.4000
Fax 202.408.4400
www.finnegan.com

4,588,410 to Konrad (Konrad). (Office Action of July 31, 2002, pg. 3.) Applicants respectfully disagree with and traverse the rejection.

The Office argues that “[i]t would have been obvious to... at least partially substitute the m-aminophenol coupler in the composition and process of Lang... because [a] Lang does not require any specific oxidation dyes... and [b] Konrad teaches that the claimed substituted m-aminophenols have various improvements over the conventionally used m-aminophenols...” (Office Action of July 31, 2002, pg. 4, ln. 3-9; Office Action of May 8, 2001, pg. 3, lns. 15-20.)

The rejection, however, is flawed for at least the reasons that:

(1) the Office has not cited and the references do not contain a reasonable expectation of success for the Office’s proposed combination; and

(2) the alleged motivation is not applicable to the specific combination suggested by the Office.

1. NO REASONABLE EXPECTATION OF SUCCESS

Although a prima facie case of obviousness requires evidence of a reasonable expectation of success found in the art (see, e.g. *In re Vaeck*, 20 U.S.P.Q.2d 1438, 1442 (Fed. Cir. 1991)), the Office has not cited and Lang and Konrad do not contain any such evidence. The art is, in fact, unpredictable, thus undermining the Examiner’s position. *Id.* at 1443 (“evidence of uncertainty... tends to rebut” an obviousness rejection). As shown in Applicants’ Appeal Brief filed May 3, 2002, this unpredictability is well documented, and has even been relied upon by the Office. As also shown in detail in Applicants’ Appeal Brief, the well-known and specific evidence of unpredictability undermine the rejection.

Additionally, the Office has argued that "the closest prior art of record, Lang's Example q, was not compared." (Office Action of July 31, 2002, pg. 4, ln. 20.)

However, this argument does not remedy the deficiencies in the Office's rejection.

First, evidence of unpredictability, which shows the absence of a reasonable expectation of success and hence the absence of a prima facie case of obviousness (see, e.g., *In re Vaeck*, 20 USPQ2d 1438, 1443 (Fed. Cir. 1991)), need not be based on the alleged "closest prior art." On this point, the Office has confused the issues of the reasonable expectation of success necessary to first establish a prima facie case and evidence of unexpected results relied upon to overcome a prima facie case.

Second, even if there were a "closest prior art" requirement relevant to the requisite reasonable expectation of success, the MPEP expressly advises the examiners that "Applicants may compare the claimed invention with prior art that is more closely related to the invention than the prior art relied upon by the examiner." MPEP § 716.02(e) (citing *In re Holladay*, 199 USPQ 516 (CCPA 1978).) Since the evidence of unpredictability cited by Applicants is at least as close, if not closer, than the examples cited by the Office, the evidence is sufficient to show that the Office failed to establish a prima facie case.

Accordingly, the Office's proposed combination of various reactive chemical components fails to support a prima facie case of obviousness against the presently claimed invention.

2. MOTIVATION TO COMBINE

It is not sufficient to merely "find every element of a claimed invention in the prior art [and for] an examiner to use the claimed invention itself as a blue print for piecing

together elements... Such an approach would be an illogical and inappropriate process by which to determine patentability.” *In re Rouffet*, 47 U.S. P.Q.2d 1453, 1457 (Fed. Cir. 1998) (citations and quotations omitted). The Office can only meet the burden of establishing a prima facie case of obviousness “by showing some objective teaching in the prior art or that knowledge generally available to one of ordinary skill in the art would lead that individual to combine the relevant teachings of the references.” *In re Fine*, 5 U.S.P.Q.2d 1596, 1598 (Fed. Cir. 1988) (internal citations omitted) (emphasis added); *see also In re Sang-Su Lee*, 277 F.3d 1338, 1433 (Fed. Cir. 2002).

However, as was the case in *Fine*, the showing of an objective teaching “has not done.” 5 U.S.P.Q.2d at 1599. Specifically, the Office has not based the rejection on an objective teaching to combine Lang’s cationic direct dye with Konrad’s substituted m-aminophenol coupler.

a. Objective Teachings of Motivation are Absent.

Konrad and Lang, taken together, fail to provide an objective teaching that would lead one skilled in the art to combine Konrad’s substituted m-aminophenol coupler in a composition according to Lang comprising both an oxidation base and a diazo-bridged direct dye.¹ Moreover, Konrad and Lang fail to provide an objective teaching to combine the direct dye of Lang example 14 with Konrad’s substituted m-aminophenol coupler. These deficiencies preclude a prima facie case of obviousness against the presently claimed invention.

¹ Although for the sake of clarity the cited references are, in some instances, discussed one at a time, it should be understood that all of Applicants’ discussions are to the cited reference combinations taken as a whole.

The Office relied on Konrad for providing motivation for the suggested modification of Lang. Specifically, the Examiner argued that:

It would have been obvious... to at least partially substitute the m-aminophenol coupler in the composition and process of Lang... because Lang does not require any specific oxidation dyes for use in the patentee's composition, and Konrad teaches that the claimed substituted m-aminophenols have various improvements over the conventionally used m-aminophenols.

(Office Action of July 31, 2002, pg. 4, ln. 3-9; Office Action of January 4, 2002, pg. 4, lns. 3-10.) In other words, the Office relies on Konrad for providing motivation to use substituted m-aminophenols in oxidation dyes, and simply notes that the suggested modification is not expressly excluded by Lang.

However, the Office has not shown and Konrad and Lang, taken together, do not contain the requisite motivation for the Office's proposed substitution in Lang cationic direct dye based composition of m-aminophenol with Konrad's substituted m-aminophenol. The Office has, apparently, failed to fully appreciate the fact that Lang's diazo-bridged direct dye compositions, such as that of example q, are not mere static mixtures of unrelated components. They are not analogous to physical compositions, such as a mixture of different size ball bearings.

Rather, the diazo-bridged direct dye composition must be considered as a whole, and understood to have a unique chemical identity that, due to the potential for chemical interactions and reactions, is more than merely the sum of its components. The failure to recognize the potential for interactions between chemical components is starkly inconsistent with even a basic understanding of chemistry. See, e.g., *In re Larsen*, 130 USPQ 209, 213 (CCPA 1961) (Martin, J., concurring) ("...I am aware that machines

differ from chemical compounds in that the individual parts of a machine retain their identity and merely interact or cooperate in producing some desired result while chemical reactants lose their identity in reacting to produce a new substance...”)

The Office’s reliance on the, at best, very generalized teaching of Konrad as motivation for the Examiner’s proposed combination is contrary to the Federal Circuit decision on combining references absent a specific motivation of record for the proposed combination. For example, in *In re Vaeck*, the Federal Circuit reversed the Office’s rejection under § 103 where the rejection was based on a combination of references that lacked a specific suggestion for the proposed combination. 20 USPQ2d at 1443.

Much like *Vaeck*, the primary reference (Lang) relates one type of dye composition (a specific cationic diazo-bridged direct dye composition, further comprising an oxidation base and coupler) while the secondary reference (Konrad) relates to another type of dye composition (a purely oxidation dyeing composition). The Office proposed ‘at least partial substitution’ rests on the premise that any suggestion in the secondary reference with respect to oxidation dyes is equally applicable to a cationic direct dye composition. This is a false premise.

As in *Vaeck*, the subject matter of the primary and secondary references are not identical. ~~Direct dyes and oxidation dyes are chemically distinct, and have distinct~~ applications and effects. The “various improvements” of Konrad, even as alleged by the Office, are not with respect to the use of Konrad’s substituted m-aminophenol in a direct dye based composition according to Lang. Konrad is silent with respect to compatibility

and use with direct dyes.² Accordingly, the Office's alleged motivation based on an oxidation base is insufficient to support the specific combination with a cationic direct dye. *Vaeck* at 1443. Likewise, the Office's proposed modification is distinguished from *O'Farrell* for at least the reason that the references do not "explicitly" suggest the substitution of Konrad's oxidation coupler into Lang's diazo-bridged direct dye composition.

The premise of the Office's argument (that a teaching or suggestion with respect to oxidation dye systems are equally applicable to a cationic direct dye composition) is also unsupported by any evidence of record. However, unless "substantial evidence" found in the record supports the factual determinations central to the issue of patentability, the rejection is improper and should be withdrawn. *In re Zurko*, 59 USPQ2d 1693, 1697 (Fed. Cir. 2001). More specifically, in *Zurko* the Federal Circuit explicitly required "concrete evidence in the record in support of these [core factual] findings" in a determination of patentability. *Id.* Such concrete evidence in support of the use of Konrad's substituted m-aminophenol coupler with Lang's non-conventional direct dye composition is absent from the Examiner's argument, and is absent from the record. See also *Lee*, 277 F.3d at 1433.

Moreover, by focusing on an abstract teaching of Konrad that does not address ~~any of the specific motivation issues identified below, the Office has failed to treat the~~

² Konrad identifies various other components that may be used with their substituted m-aminophenol, such as wetting agents and thickeners. (Konrad, col. 3, ln. 63 - col. 4, ln. 18.) Notoriously, there is no mention in Konrad of compatibility with direct dyes, or any suggestion of the use of direct dyes with the disclosed m-aminophenol. The only mention of direct dyes is as background (Konrad, col. 2, lns. 19-24), but this is distinct and separate from Konrad's compositions comprising a substituted m-aminophenol.

composition of Lang example q as a whole, or to even recognize that it is a chemical composition composed of a large number of components that have potentially hundreds of chemical interactions or reactions to consider. In short, the Office has failed to recognize that the composition containing base B and coupler C is a different composition than the composition containing base B, coupler C, and direct dye D.

Consequently, among other things, missing from the objective teaching of Konrad and Lang is the motivation to:

- use Konrad's coupler in place of *m-aminophenol* in a composition comprising a direct dye;
- use Konrad's coupler in place of *m-aminophenol* in a composition comprising the direct dye of Lang example 14; and
- use Konrad's coupler in place of *m-aminophenol* in a composition comprising all fourteen of the chemical components of Lang example q.

More specifically, neither Konrad nor Lang provide any motivation for using Konrad's coupler in a composition comprising a direct dye, much less the specific class of direct dyes disclosed in Lang, much less the particular direct dye of Lang example 14. In fact, given that Konrad does not include direct dyes among the specifically identified compatible components (see Konrad, col. 3, line 63 - col. 4, line 18), it is even more evident that Konrad does not provide an objective teaching directed towards the Office's suggested combination. Furthermore, and of equal importance, the references also lack any motivation for using Konrad's coupler in compositions comprising all the potentially interacting components of Lang example q.

Apparently in response to Applicants showing that there is no objective teaching to combine Konrad's substituted m-aminophenol with the direct dye composition of Lang example q, the Office argues "[h]owever, Applicant is not adding a component but is replacing the m-aminophenol in example q with the m-aminophenol which has been invented by Konrad as an improvement over m-aminophenol." (Office Action of July 31, 2002, pg. 6, ln. 1-5.) The Office's own characterization of how Applicants invented the presently claimed subject matter is, at best, irrelevant. See, e.g., 35 U.S.C. § 103(a) ("Patentability shall not be negated by the manner in which the invention was made.") Thus, the relevancy of the Office's statement is not understood. Clarification for the record is requested.

Accordingly, since the cited references lack an objective teaching for the suggested combination/modification, a prima facie case of obviousness has not been established.

b. *Kerkhoven* is Not Applicable

The Office attempts to prop up the rejection by arguing that "[i]t is prima facie obvious to combine two compositions each taught by the prior art to be useful for the same purpose, in order to form a third composition which is to be used for the very same purpose." (Office Action of July 31, 2002, pg. 6, ln. 14-17; Office Action of May 9, 2001, page 5, lines 15-17.) However, the present case differs from the facts of *In re*

Kerkhoven, 205 USPQ 1069 (CCPA 1980), cited by the Office to support of this argument. Moreover, it is impermissible for the Office to attempt to rely on *Kerkhoven* as a short cut means to establishing a prima facie case of obviousness without first

FINNEGAN
HENDERSON
FARABOW
GARRETT &
DUNNER LLP

1300 I Street, NW
Washington, DC 20005
202.408.4000
Fax 202.408.4400
www.finnegan.com

establishing the elements of a prima facie case as required by the Supreme court in *Graham v. John Deere*, 383 U.S. 1, 148 USPQ 459 (1966).

As characterized by the CCPA, the claims at issue in *Kerkhoven* “require no more than the mixing together of two conventional spray-dried detergents.” *Kerkhoven* at 1072. In contrast, the composition of Lang example q cited by the Office is not directed to static mixtures of components, such as those of *Kerkhoven*, that have no necessary interaction with one another. In fact, as discussed above, the Lang composition is a complex reactive composition comprising various components including bases, couplers, and direct dyes.

Given that Lang example q is a complex chemical mixture, the modification suggested by the Office for the at least partial substitution of one of the reactive components is in no way equivalent to the mere “mixing together” situation on which *Kerkhoven* is based. Accordingly, based on the factual differences between the present case and those presented in *Kerkhoven*, the rejection relying on *Kerkhoven* is improper.

Moreover, the more recent Federal Circuit holding in *In re Geiger*, 2 U.S.P.Q.2d 1276 (Fed. Cir. 1987), is applicable to the present situation. In *Geiger*, the Appellants claimed a method of inhibiting scale formation on and corrosion of metallic parts in cooling water systems by use of compositions containing (1) a copolymer of sulfonated styrene/maleic anhydride (SSMA); (2) a water-soluble zinc compound; and (3) an organo-phosphorus acid compound or water soluble salt. The collective prior art taught using each of these three components, separately or in a combination falling short of that claimed, for treating cooling water systems. The Board of Patent Appeals and Interferences held it prima facie obvious to combine the three components together for

their known functions and to optimize the amount of each. *In re Geiger*, 2 U.S.P.Q.2d at 1277-78.

The Federal Circuit reversed the Board, emphasizing that "[o]bviousness cannot be established by combining the teachings of the prior art to produce the claimed invention, absent some teaching, suggestion or incentive supporting the combination." *Id.* at 688, 2 U.S.P.Q.2d at 1278. The court then proceeded to go through each of the references relied on showing why, absent hindsight, the skilled artisan would not have found it obvious to make the claimed composition.

While acknowledging that combining the three components of the claimed composition may have been obvious to try, the court stated it does not constitute the standard for combining references under § 103. *Id.*; *cf. In re Wesslau*, 147 U.S.P.Q. at 393 (holding "[i]t is impermissible within the framework of section 103 to pick and choose from any one reference only so much of it as will support a given position, to the exclusion of other parts necessary to the full appreciation of what such reference fairly suggests to one skilled in the art").

Thus, as in *Geiger*, even if components or compositions have known functions for the same purpose, the Office must nevertheless establish all the elements of a prima facie case including, among other things, some teaching, suggestion or incentive supporting the combination. However, the Office's reliance on *Kerkhoven* in an attempt to establish a prima facie case of obviousness, based on the argument that it is obvious to mix two compositions known for the same purpose, is misplaced given that an objective teaching, suggestion or incentive supporting the combination has not been established.

The Office also argues that *Kerkhoven* is applicable because “[t]he direct dye is not a reactive component, and does not take part in the oxidative polymerization.” (Office Action of July 31, 2002, pg. 6, ln. 21 - pg. 7, ln. 5.) However, since the Office is proposing “to at least partially substitute the m-aminophenol coupler” of Lang with a substituted m-aminophenol coupler attributed to Konrad (Office Action of July 31, 2002, pg. 4, ln. 3-11 (emphasis added)), even if the premise of the Office’s argument were valid (though Applicants do not agree that it is), the Office’s conclusion that *Kerkhoven* is applicable is clearly false since the proposed ‘at least partial substitution’ involves a reactive coupler.

In making the present rejection, the Office asserts that compatibility of oxidation and direct dyes are irrelevant due to the Office’s lack of knowledge of any interaction between oxidation and direct dyes. (See, e.g., Office Action of July 31, 2002, pg. 7, ln. 1-5.) Elsewhere, however, the Office specifically alleges that the compatibility of oxidation and direct dyes is an issue of importance addressed in the art. For example, the Office relies on U.S. Patent No. 6,001,135 to Rondeau “for teaching the equivalence of the double base as claimed in claim 37 to the oxidation bases used in Lang *when used in compositions containing cationic direct dyes.*” (Office Action of July 31, 2002, pg. 7, ln. 12-14 (emphasis added).) Accordingly, since, as alleged by the Office, ~~oxidation dye and direct dye compatibility is an issue of importance in the art,~~ the Office is not free to use Konrad’s coupler in a composition comprising Lang’s diazo-bridged direct dye absent a motivation and reasonable expectation of success for the specific combination. In making the present rejection and by relying on *Kerkhoven* as the

alleged motivation, the Office has shown no such recognized compatibility, motivation, or reasonable expectation of success.

Therefore, since the Office has not established and the references do not contain sufficient objective teachings of a motivation to combine, a prima facie case of obviousness has not been established.

Reconsideration and withdrawal of the rejection are respectfully requested.

B. Lang in view of Konrad in further view of U.S. Patent No. 6,001,135 (Rondeau '135).

Claims 37-39 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Lang and Konrad as applied to claim 26 and further in view of U.S. Patent No. 6,001,135 (Rondeau '135). Applicants respectfully disagree with and traverse the rejection.

The Office relies on Rondeau '135 "for teaching the equivalence of the double base as claimed in claim 37 to the oxidation bases used in Lange when used in compositions containing cationic direct dyes." (Office Action of July 31, 2002, pg. 7, ln. 12-14.) However, this argument does not justify the rejection. In addition to the deficiencies noted above for the combination of Lang and Konrad, the present rejection further suffers from an improper reliance on an alleged equivalence of oxidation bases and the view that it is prima facie obvious to substitute allegedly equivalent components.

When there is a functional relationship between components, the law is clear for a novel combination that it is not prima facie obvious to combine known components. *United States v. Adams*, 383 U.S. 39, 50 (1966). In *Adams*, for example, the claimed invention was a wet battery with magnesium and cuprous chloride electrodes. *Id.* at 42. The prior art showed wet batteries with zinc and silver chloride electrodes, and that zinc

and silver chloride may be substituted with magnesium and cuprous chloride, respectively. *Id.* at 48. Based such a substitution, it was argued that the claimed battery was obvious. *Id.*

The Supreme Court, however, found this position to be flawed. *Id.* They distinguished *Sinclair & Carroll Co. v. Interchemical Corp.* 325 U.S. 327 (1945), where the substitution of an inert component for an equivalent component was held to be obvious, based on the fact that in *Adams* “the [claimed] battery is shown to embrace [known] elements having an interdependent functional relationship.” *Adams*, 338 U.S. at 49-50 (emphasis added). Specifically, they held that “[i]t begs the question... to state merely that... [the elements] were individually known battery components [and therefore obvious]. If such a combination is novel, the issue is whether bringing them together as taught by [the applicant] was obvious in the light of the prior art.” *Id.* at 50.

Accordingly, since the proposed modification involves reactive components, such as the oxidation base according to Rondeau ‘135, that have “interdependent functional relationship[s],” the Office can not justify the present rejection based on an alleged “know equivalence.”

Reconsideration and withdrawal of the rejection are respectfully requested.

C. U.S. Patent No. 5,919,273 to Rondeau *et al.* (Rondeau ‘273)

Claims 26-60 stand rejected under 35 U.S.C. § 103(a) over U.S. Patent

No. 5,919,273 to Rondeau *et al.* (Rondeau ‘273). Applicants respectfully disagree with and traverse the rejection.

The Office argues that a compound is *prima facie* obvious in view of its positional isomer. (Office Action of July 31, 2002, pg. 8, ln. 1-15.) However, even if a species

may, in some circumstances, render obvious its positional isomer, there is no *per se* rule that a species will render obvious its isomer. In fact, in order to establish a prima facie case of obviousness based on similar chemical structure the Office must show that “the prior art gives reason or motivation to make the claimed compositions... .” *In re Dillon*, 16 USPQ2d 1897, 1901 (Fed. Cir. 1990). Likewise, the M.P.E.P. clearly states that “[i]somers... are not necessarily considered equivalent by chemists skilled in the art and therefore are not necessarily suggestive of each other.” M.P.E.P § 2144.09, citing *Ex parte Mowry*, 91 USPQ 219 (Bd. App. 1950).

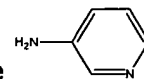
In the present case, the Office has merely asserted that Rondeau '273 discloses “a dyrideneazo, dye II-30, which is a positional isomer of the dyes claimed in this application... [and that it] would have been obvious... to formulate a composition for dyeing keratin hair containing the direct dyes as claimed with the substituted aminophenol as claimed an oxidation bases as claimed because Rondeau ['273] teaches compositions, processes and kits which include a positional isomer of applicant's claimed dye.” (Office Action of July 31, 2002, pg. 8, ln. 7-15) However, this assertion of an isomeric relationship is not a showing that “the prior art gives reason or motivation to make the claimed compositions... .” *Dillon* at 1901. A rejection such as the present one where the required elements of a prima facie case are not supported by concrete evidence of record or are supported only by “subjective belief and unknown

authority” will be reversed by the Federal Circuit. *In re Sang-Su Lee*, 61 USPQ2d 1430, 434 (Fed. Cir. 2002); see also *In re Zurko*, 59 USPQ2d 1693 (Fed. Cir. 2001).

Moreover, it is known in the present art that the properties of isomeric related species are not necessarily similar to or predicable from one another. For example, an

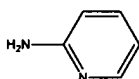
ortho substituted phenol ring may be a base while its meta isomer will be a coupler. As a further example, Lang, U.S. Patent No. 4,025,301, relied upon by the Office as the primary reference for other rejections under 35 U.S.C. § 103, teaches that its diazo-

bridged heterocyclic direct dyes, which are derived from meta-amino pyridine



are unique even with respect to other azo dyes derived from the isomeric ortho-amino

pyridine



(Lang, col. 1, lns. 61-64.) Thus, the evidence shows that rather than expecting similar properties, the para-amine pyridine according to Rondeau '273 dye II30 would be expected to have different properties than a meta-amine pyridine. Especially given this evidence, the Office cannot reasonably assert that Rondeau '273 dye II30 renders obvious all its positional isomers³ absent some specific motivation to make the proposed structural modification.

Accordingly, even if an isomeric relationship exists, this fact alone does not establish a prima facie case of obviousness absent, *inter alia*, a reason or motivation to make the claimed composition. Reconsideration and withdrawal of the rejection are respectfully requested.

II. Double Patenting Rejections

A. U.S. Patent No. 5,919,273

Claims 26-60 stand rejected under the judicially-created doctrine of obviousness-

type double patenting as being unpatentable over claim 1-43 of U.S. Patent No.

5,919,273, which is the same reference cited above (Rondeau '273) as the basis for a

³ Rondeau dye II30 has at least about 500 positional isomers.

rejection under 35 U.S.C. § 103. Applicants respectfully disagree with and traverse the rejection.

As discussed previously with respect to Rondeau '273, the reference does not provide any motivation to make the proposed structural modification of pyridineazo dye II30. As the Office is aware, the "analysis employed in an obviousness-type double patenting rejection parallels the guidelines for analysis of a 35 U.S.C. 103 obviousness determination... [and] the factual inquiries set forth in *Graham v. John Deere Co.*... are employed when making an obvious-type double patenting analysis." M.P.E.P. § 804. Accordingly, absent, *inter alia*, the requisite motivation to modify this component, a prima facie case of obviousness has not been established and the obviousness-type double patenting rejection is in error.

Reconsideration and withdrawal of the rejection are requested.

B. Application No. 09/424,119

Applicants acknowledge and appreciate the Office's withdrawal of the obviousness type double patenting rejection over co-pending application no. 09/424,119. (Office Action of July 31, 2002, pg. 2.)

III. Conclusion

Reconsideration and withdrawal of the present rejections are respectfully requested.

Although the present Response is believed to be timely since the Office Action of July 31, 2002, did not set a shorten statutory deadline, to the extent any extension of time is required to obtain entry of this Response, such extension is hereby respectfully requested. If there are any fees due under 37 C.F.R. §§ 1.16 or 1.17 which are not


enclosed herewith, including any fees required for an extension of time under 37 C.F.R.

§ 1.136, please charge such fees to our Deposit Account No. 06-0916.

Respectfully submitted,

FINNEGAN, HENDERSON, FARABOW,
GARRETT & DUNNER, L.L.P.

Dated: December 2, 2002

By: 
Mark J. Feldstein
Reg. No. 46,693

FINNEGAN
HENDERSON
FARABOW
GARRETT &
DUNNER LLP

1300 I Street, NW
Washington, DC 20005
202.408.4000
Fax 202.408.4400
www.finnegan.com